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No. 91-324

In The

Supreme Court of the United States

October Term, 1991

STATE OF MISSOURI, *et al.*,

Petitioners,

v.

KALIMA JENKINS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS JENKINS, *ET AL.* IN OPPOSITION TO CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether, having found that capital improvements were critical to the success of a school desegregation plan, the courts below erred in requiring the culpable parties to carry out those improvements in compliance with applicable provisions of the Asbestos Hazard and Emergency Response Act, 15 U.S.C. §§ 2641-2654 (1988).

2. Whether, having found that construction of a new high school was critical to the success of the school desegregation plan, the courts below erred in approving adjustments to the budget for the school.

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COUNTER-STATEMENT OF THE CASE

A. Introduction

Petitioners, officials of the State of Missouri, invite this Court, on the narrowest of questions, to review broadly a school desegregation remedy alleged to be excessive. Understandably, petitioners fail to reveal the expansive nature and scope of their violations, which required both the narrow aspects of the remedy that are actually before the Court and the remedy as a whole. Because this Court has never reviewed the violations,[1]

[1] Nor has the Court reviewed the remedy in this case. Previously, this Court has declined to review the school-

and because "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation[s]," *Milliken v. Bradley*, 433 U.S. 267, 280 (1977), respondent schoolchildren briefly recount the lower courts' violation findings and the extensive record evidence supporting them.[2]

B. Overview of the District Court's Findings

Prior to 1954 Missouri mandated racially segregated schools. The district court found that every "school district in Missouri participated in this dual system," and that intentionally segregated "access" to schools and particularly school districts had the effect of concentrating blacks within the Kansas City, Missouri School District ("KCMSD"). 593 F.Supp. at 1490. The court further found that Missouri's continuing segregation of schools in the decade after 1954 "led to white flight from the KCMSD to suburban districts [of a] large number of students . . . and that it has caused a wide reduction in student achievement in the schools of KCMSD." Order, August 25, 1986, at 1-2. As a further result of Missouri's continuing segregation of blacks in KCMSD's inferior schools, and of the consequent refusal of white voters to support the district financially, the KCMSD's "physical facilities have literally rotted," and the "overall condition" of the

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children's petition seeking a broader, interdistrict remedy, *Jenkins v. Missouri*, 484 U.S. 816 (1987), and the State's petition seeking a narrower remedy, 490 U.S. 1034 (1989). This Court has reviewed issues of attorneys fees 491 U.S. 274 (1989) and funding of remedies, 110 S.Ct. 1651 (1990).

[2] In the course of its deliberations on violations and remedy, the district court heard evidence from more than 250 witnesses over 130 days, amassed a transcript exceeding 40,000 pages and received more than 50,000 pages of documentary evidence.

schools became so "generally depressing . . . [as to] adversely affect[] the learning environment." 672 F.Supp. at 411, 403.

These findings and the voluminous record evidence supporting them are discussed in more detail below.

C. Pre-1954 Violations

From 1865 through 1976 Missouri's constitution required "separate" schools for "children of African descent,"[3] and, from 1889 to 1954, the State enforced that provision with statutes making it a criminal offense for "any colored child to attend a white school."[4]

Missouri superimposed its dual schools on a vast and intensely fragmented system of individual school districts. Unlike other southern states that mandated segregation, Missouri did not have a small number of large, county-wide school districts. Instead, like most northern states, Missouri distributed its schoolchildren among a large number of small school districts – over 10,000 districts in 1900, and 8000 as late as 1948 (compared to 546 today). P.Ex. 212.

Because Missouri's black population before 1954 was widely dispersed among its many small school districts,[5]

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[3] Mo. Const. 1865, art. 9, § 2.

[4] 1889 Mo. Laws 226, expanded in 1909 Mo. Laws 770, 790, 820 to include even private schools. The history of Missouri's de jure school segregation appears in detail in the decision in *Adams v. United States*, 620 F.2d 1277 (8th Cir. 1977) to which the district court referred in making its violation findings, 593 F.Supp. at 1485.

[5] Before 1954, more than half the State's school-aged black children lived in 93 counties in each of which fewer than 1,000 black children were widely and thinly dispersed among the county's 60 to 100 school districts. P.Exs. 208, 210, 184, 184A.

the state's racial segregation requirements had a particularly strong residential effect on the state's black schoolchildren. In particular, most of Missouri's school districts reserved their single schoolhouses for whites and required black children to seek an education outside the district.[6] Because Missouri did not require school districts to educate blacks locally or to reimburse them for tuition and transportation expenses incurred in getting an education elsewhere,[7] black families with children typically had no choice but to move to the few urban districts in the state that provided black, as well as white, schools.[8]

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[6] In 1866, the state school superintendent reported that blacks "are so widely scattered that it is impossible to collect them in sufficient number to warrant the expense of a school." P.Ex. 208. In 1914, the superintendent reported that lack of schools for blacks was "driving these people to towns in order to educate their children." P.Ex. K28. In 1922, the superintendent reported "where there are fewer than fifteen [black] children in a district . . . the school board is not interested in assisting these negro children to get an education." P.Ex. K30.

[7] *Board of Educ. v. St. Louis*, 149 S.W.2d 878 (Mo. 1941) (school districts not required to pay for inter-county transfers).

[8] *Jenkins*, 593 F.Supp. at 1490. For example, in the three counties around the KCMSD, 55 school districts enumerated blacks but failed to provide any reimbursement for tuition and transportation before 1931, when one district started paying. Only one other district was making payments as of 1945, and even in 1953 only five districts made such reimbursements. During much of that time, the KCMSD tuition amounted to one-fourth of the income of an average black family. Tr. 4313-4, 5355-8. As a result, black families initially tried to collect subscriptions to operate private schools. That failing, black parents next tried to convey their children to KCMSD, at their own expense, by horse and buggy, taxis, public buses, hired hearses, and on trains or on foot along routes plied by school buses reserved for white children only. Eventually, many families boarded their children with relatives and strangers in the

Citing this and other evidence, the district court found "an inextricable connection between schools and housing in the Kansas City area." Because black " '[p]eople gravitate[d] toward school facilities,' " the " 'location of [black] schools influence[d] the patterns of residential development of [the] metropolitan area and ha[d] important impact on composition of inner city neighborhoods.' " 593 F.Supp. at 1491 and Order of June 5, 1984 at 101, quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-21 (1971). Between 1900 and 1954 the number and ratio of black families with school-children in the school districts surrounding the KCMSD declined precipitously. P.Ex. 53E. Although 21% of black students in the 3-county area lived outside the KCMSD in 1900, that proportion had fallen to 3% by 1954. *Id.* The district court found that access to schools was a "major factor" in causing blacks to move into the KCMSD.[9] "Undeniably," the district court found, "blacks moved" out of districts that did not "maintain the state-required

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KCMSD; broke their families into two households, mother and children in the KCMSD, father working back home; and in the end, gave up their jobs and homes and moved entire families to the KCMSD.

[9] 593 F.Supp. at 1490, citing Tr. 16693 (expert testimony that lack of schools for blacks prompted the "depletion of black people from surrounding towns" into Kansas City). An expert for the schoolchildren described the impact of Missouri's system of school segregation as a lost opportunity to take advantage of the naturally high degree of residential integration once characterizing the 3-county area. Tr. 14,805-6, 15,286-7. Missouri's demographer admitted that the "existence of a core of blacks caused by [governmental segregation] in the Kansas City area would have long lasting effects [because] . . . blacks tend to move short distances from the core . . . and in-migration [of blacks] tends to focus on that black core as a result of . . . informational networks." Tr. 22,076, 22,091.

separate schools [for blacks] . . . to districts, including the KCMSD, that provided black schools." 593 F.Supp. at 1490.

The district court found that the "intensity" of the "segregation" that resulted from state-mandated shifts in the black and white population in the Kansas City area "is demonstrated by the fact that the average black family [in Kansas City] lives in a census tract that is 85% black while the average white family [in the suburbs] lives in a census tract that is 99% white." 593 F.Supp. at 1491.

D. Post-1954 Violations

After ninety years of vigorous criminal and civil enforcement of school segregation prior to 1954, Missouri informed local school districts six weeks after *Brown v. Board of Educ.*, 347 U.S. 483 (1954), that they henceforth could make their own decisions about whether, where, and how to educate black students.[10]

The district court found that, notwithstanding the State's acknowledged ability throughout the period to "do something about this entire matter of having segregated schools in Missouri by requiring reorganization [of boundaries] where [segregation] occurs,"[11] the State

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[10] P.Ex. 2322. (June 30, 1954 opinion of the Missouri Attorney General informing districts that they "*may* . . . permit white and colored children to attend the same schools" but assuring them that it was up to them to decide "whether [they] *must* integrate").

[11] State education officials have long acknowledged the State's ability to solve the problem of its segregated schools. When a federal court ordered the consolidation of three small Missouri school districts as a remedy for unconstitutional school segregation in 1975, and members of the Missouri Gen-

procrastinated for exactly thirty years after Brown – until a desegregation order was entered – before taking any steps to desegregate the black children segregated within the KCMSD. 593 F.Supp. at 1505 (finding that Missouri "cannot defend its failure to affirmatively act to eliminate the structure and effects of its past dual system").

With the State Attorney General's authorization, and the State Board and Department of Education's knowledge and acquiescence, the KCMSD acted repeatedly during the twenty years following *Brown* to extend its dual system, eventually concentrating more black children in the district's expanding black core and causing white families to move from the area to all white attendance zones just inside or outside the KCMSD's boundaries.[12] KCMSD expanded the dual system of schools in the area

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eral Assembly inquired about the matter, Missouri's Commissioner of Education, in letters to state board of education members, noted:

> It is interesting that members of the General Assembly directly associated with this matter are just now getting involved. However, I guess I am not surprised because I know the General Assembly would like to stay out of this area of controversy altogether. I have tried to keep them out by saying to everyone involved that the Missouri General Assembly really cannot do anything about . . . [school segregation]. It is true that *the General Assembly could do something about this entire matter of having segregated schools in Missouri by requiring reorganization where it occurs but I doubt if we'll see that.*

P.Ex. 2463. (Emphasis supplied)

[12] In 1977, when this action was filed, 25 of the pre-1954 one race schools remained 90% or more of the same race and 80% of all blacks in Kansas City attended schools that were 90% or more black. *Jenkins*, 593 F.Supp. at 1492. In 1954 the KCMSD operated 14 schools for only blacks. At trial, in 1984, 24 schools had 90% or more black students. *Id.*

by several means: gerrymandering attendance zones;[13] turning schools from all-white to nearly all black in a single year;[14] explicitly segregating classrooms within potentially integrated schools;[15] letting whites in racially transitional schools transfer freely to all-white schools throughout the 1950s, 1960s, and early 1970s; repeatedly selecting segregative sites for new schools during the same period; racially targeting faculty assignments; and replacing math and science courses in previously all-white schools with courses, for example, in "janitorial services" for the black children newly segregated in those schools.[16] The district court found that the direct effects of branding black children as unfit classmates (or even recess- or lunch-mates), and making blacks' education

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[13] During one short span of time, the district gerrymandered school attendance boundaries over three hundred times, usually changing lines by only a block or two, to assure that the growing black population remained in all-black school attendance zones.

[14] Ex.K2; Stipulation of February 21, 1984 (by moving boundaries into the expanding black core ten or fifteen blocks and by inviting the remaining whites in the new attendance area to take advantage of the KCMSD's Liberal Transfer Policy to transfer to all-white schools, the district turned virtually all-white elementary schools into virtually all-black schools in a single year). Central High and Junior High Schools were the first secondary schools that the KCMSD's segregative policies tipped from all white in 1955 to 95%+ black by 1960. Ex.K2.

[15] 593 F.Supp. at 1494 (for years black schoolchildren in the 1960s walked to the overcrowded elementary school near their homes from where they and a black teacher were bused to an under-utilized white school where they were given their own all-black classroom and made to take their own separate recess and lunch periods).

[16] *Jenkins*, 593 F.Supp. at 1493-4. *See also* Tr. 7018-21, 7338-41, 8624-5, 8969-71, 9419-20; Stipulation 75 of February 21, 1984.

inferior were largely demographic: While blacks perforce remained in their own, expanding, neighborhoods in the core of KCMSD, the State's and KCMSD's violations "led to white flight from the KCMSD to suburban districts, [a] large number of students leaving the schools of Kansas City . . . "[17]

The district court also found that the racially restrictive covenants that Missouri enforced until five years after *Shelley v. Kraemer*, 334 U.S. 1 (1948), the racially segregated "dual housing market" that the State's housing and insurance agencies "encouraged,"[18] the State's explicitly racially segregated relocations of persons displaced by highways and urban renewal programs, the State's history of discriminatory actions in regard to schools, housing, marriages and other practices, and KCMSD's continuation of its segregative school policies in the 1950s, 1960s and 1970s with the State's blessing "created an atmosphere in which private white individuals could justify their bias . . . against blacks," thus encouraging racially discriminatory redlining, steering and blockbusting in insurance, real estate and banking and further steering blacks into the KCMSD and whites into outlying areas. 593 F.Supp. at 1503.

Among the effects of these violations that the district court found are the following: (i) Black children within the KCMSD were subjected to system-wide racial isolation of great "intensity." 593 F.Supp. at 1485 (rejecting Missouri's argument that factors other than schools caused the intense segregation). (ii) A "large number of

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[17] Order, August 25, 1986 at 1; Tr. 8715-6, 8721-30, 9228-32, 9235 (cited at 593 F.Supp. at 1494); Tr. 17,314-16 (admission by Missouri that KCMSD underwent rapid transformation as "whites fled the district").

[18] *Jenkins*, 593 F.Supp. at 1491, 1503.

[white] students" and their families fled the KCMSD for "suburban districts."[19] (iii) As "many residents of the KCMSD left the district and moved to the suburbs" with their children, the KCMSD was left with a white voting majority that was without children or was unsupportive of the district's mainly black student population and that for nearly two decades "refused to approve a tax levy increase and a bond issue." 672 F.Supp. at 412. (iv) These financial restrictions on the district led to "rotted" and "generally depressing" physical facilities. *Id.* at 403, 411. As the court of appeals noted:

> The findings of fact demonstrate a spiraling effect of white children leaving the KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle.

855 F.2d at 1305. (v) Throughout the 30 years after *Brown*, the educational achievement of black children suffered, as the "inferior education indigenous of the state-compelled dual school system caused" a "system wide reduction" in student achievement in the schools of the KCMSD, 593 F.Supp. at 1492, 639 F.Supp. at 24. As a result, the district's educational-quality rating from the State dropped to lowest in the area, and the district's ability to retain nonminority students declined further. 639 F.Supp. at 24, 26, 29.

Missouri did not appeal any of the district court's findings as to the nature and scope of its violations, nor did it appeal the findings of pervasive, system wide

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[19] Order, August 25, 1986, at 1-2. *See e.g.*, Tr. 12993-4, P.Ex. 53G, K.Ex.2 (nearly 15,000 whites left KCMSD schools in waves over 15 years as the defendants' violations spread through the school district).

demographic, physical, and educational effects caused by those violations.

Although the district court found that these findings added up to a history of constitutional violations with "intens[e]" segregative effects, it concluded that the innocence of the suburban school district defendants in causing the racial transformation of area schools and the absence of sufficient segregative effects in any particular district, aside from the KCMSD, precluded the inclusion of the suburban districts in an interdistrict remedy.[20] The district court thereupon ordered proposals for a remedy limited to the KCMSD, except insofar as voluntary measures might enable black children to attend school in the suburbs and enable suburban white children to attend magnet schools in the KCMSD at state expense.

D. The Ordered Remedies

As the district court began devising a remedy for the violations it had found, it laid out two legal standards that it would follow. It noted that "the scope of the

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[20] 593 F.Supp. at 1488 ("plaintiffs simply failed to show that those [suburban district] defendants had acted in a racially discriminatory manner that substantially caused racial segregation in another district"). In January, 1985 the schoolchildren and KCMSD submitted their first proposed remedy, a broad interdistrict consolidation plan, that would have created fully integrated schools at comparatively little cost to Missouri. KCMSD Plan For Remedying Vestiges of Segregated Public School System, docket no. 1046. The State did not support the proposal, and the district court declined to consider it, requiring instead the submission of plans that imposed no obligations upon surrounding school districts. Order, January 25, 1985. An equally divided en banc court of appeals affirmed, 807 F.2d 657 (8th Cir. 1986), and this Court denied the schoolchildren's petition for certiorari to review the denial of interdistrict relief. 484 U.S. 816 (1987).

remedy is determined by the nature and extent of the constitutional violation," and that the goal of a remedy is to prohibit new violations and eliminate the "vestiges of state imposed segregation." 639 F.Supp at 23 (citing *Milliken v. Bradley*, 418 U.S. 717, 744 (1974)). Missouri never challenged these principles in the district court, the court of appeals or this Court.

Rejecting the plaintiffs' requests for a remedy involving mandatory interdistrict busing and Missouri's suggestions that the remedy focus on busing children from one part of the 75-percent minority KCMSD district to another, the district court in 1985 ordered a plan aimed at achieving two goals: (i) removal of the educational deficits to which the State's intentional segregation had subjected the black children within the KCMSD and (ii) voluntary integration efforts aimed at reversing some of the racially segregative effects of the State's violations. 639 F.Supp. 19.[21]

In order to eliminate inferior schooling, the court directed the KCMSD to implement plans (i) to achieve a more satisfactory academic rating from the State by improving KCMSD libraries and reducing teaching loads, (ii) to institute early childhood and remedial summer school programs, and (iii) to undertake the capital improvements necessary to assure that these educational programs operated in adequate buildings. The court found that such measures were necessary to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 23.

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[21] Two consecutive orders are reported together at 639 F.Supp. 19. The initial remedy order of June 14, 1985 appears at 639 F.Supp. 19-46, *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied* 484 U.S. 816 (1987). The order on pending motions of June 16, 1986 appears at 639 F.Supp. 46-56.

In order to reduce the racial isolation of KCMSD's black children, the court initially invited the State to seek the voluntary participation of surrounding districts in a transfer program by which KCMSD's minority students could volunteer to attend school in cooperating school districts nearby.[22] *Id.* at 38. In a survey ordered by the district court, thousands of black children expressed an interest in transferring out of the KCMSD to suburban schools. The court hoped that facilitating such transfers would "serve to provide additional opportunities for desegregated schools [within the KCMSD] as well as desegregative educational experiences for KCMSD students [in surrounding districts]." *Id.* Educating KCMSD's black students in the already existing and educationally appropriate classrooms of surrounding districts to which the State's violations previously had propelled the district's white students would have served to avoid the expense of renovating the KCMSD's "rotted" schools and of installing costly magnet facilities in the KCMSD to try to attract white students back from those surrounding districts.

For several years after the district court's initial remedy in 1985, Missouri did not act on the district court's order to develop a voluntary transfer plan. In 1986, the district court admonished the State for its inaction. 639 F.Supp. at 51 (warning the State that continued inaction will result in the court seeking "other methods of [desegregation] at the State's expense"). In 1990, after continued inaction by the State, the court of appeals ordered submission of a transfer plan. 904 F.2d at 419. The plan

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[22] Numerous school districts are nearby. In addition to the KCMSD, the City of Kansas City includes all or parts of 12 school districts. A dozen others are nearby.

submitted in 1990 resulted in only ten KCMSD black students transfering to a single suburban district.

Having decided against the mandatory busing of students to and from the suburbs, Order, January 25, 1985, and to and from the KCMSD's predominantly minority schools, 639 F.Supp. at 35, and faced with Missouri's failure even to try to induce voluntary transfer efforts, the district court considered other plans. It found that only two other devises were available to cure the State's intentional segregation of blacks within the KCMSD: magnet schools designed to desegregate KCMSD's schools voluntarily by attracting back some of the whites whom the violation had caused to leave the district, and capital improvements designed to repair the "generally depressing" physical condition in which the State and KCMSD's violation had left the district's facilities and thus to remove one cause of white abandonment of the district as a result of the violation.

The district court thereupon ordered the KCMSD to convert to magnet schools in order to "generate voluntary student transfers resulting in greater desegregation in the district schools" and "draw non-minority students from the private schools . . . and draw in additional non-minority students from the suburbs." Order, November 12, 1986, at 3, *aff'd*, 855 F.2d 1295 (8th Cir.), *cert. denied*, 490 U.S. 1034 (1989). The court of appeals affirmed the district court's findings that the violations had directly caused the segregation of blacks within the KCMSD and whites outside the district, and also affirmed the district court's determination that the "comprehensiveness of the

[magnet] plan was a step in the right direction" of undoing that unlawful segregation. 855 F.2d at 1304. In particular, the court of appeals determined that the magnet school orders were:

> bolstered by the district court's findings that the preponderance of black students in the district was due to the State and KCMSD's constitutional violations, which caused white flight. . . .
>
> These findings that the unconstitutional segregation caused the KCMSD to lose certain students form the basis for a remedy designed to attract them back.

Id. at 1302. The court of appeals found that the magnet school plan was "amply supported by the State's own evidence." The court of appeals further concluded that there was no evidence to support Missouri's contention that the magnet schools would not achieve voluntary desegregation of KCMSD schools. *Id.* This Court declined to review the magnet school judgments of the lower courts. 490 U.S. 1034 (1989).

In 1987 the district court next addressed the financial effects of the violation, namely, white voters' chronic refusal to vote funds for the district, and the consequent need for capital improvement. The court first requested the parties' assistance in suggesting ways that the chronically underfunded district could meet the financial requirements of the desegregation remedy. Order, July 16, 1987 at 16. Missouri replied, asking that the KCMSD, rather than the State, be required to pay the full 50 per cent share of the remedial expenses originally allocated to the district, and acquiescing in proposals for mandatory local tax increases, which the court thereupon ordered.[23]

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[23] 672 F.Supp. 400. The court of appeals affirmed, modifying the manner in which the taxes were to be increased. 855 F.2d

The district court next ordered a capital improvement plan to cure the financial and physical effects on the KCMSD of the State's violations and the consequent desertion of the district by white families and voters. The court found that unconstitutional segregation was in part responsible for the massive decay of school district buildings because the concentration of blacks and degradation of the district's educational programs made it impossible for the majority black district to secure the votes needed, from the still majority white voting population, to provide funds for repair and maintenance of its buildings. 672 F.Supp. at 403. In particular, the court found that the violations contributed to "numerous health and safety hazards, educational environment hazards," "inadequate lighting," "odors from unventilated restrooms with rotted, corroded toilet fixtures," "noisy classrooms" because of poor acoustical treatment, "faulty heating and electrical systems," and "inadequate fire safety systems." *Id.* Overall, the court found that buildings were in such disrepair as a result of the violation that even principals would not send their own children to them. Repairing those facilities was thus found to be "crucial" to the success of the voluntary desegregation plan.

The district court found that renovations of some and replacement of other buildings were necessary to (i) restore to victims of segregation the facilities denied to them by the violations, (ii) undo some of the educational harms caused by the violation, and (iii) upgrade facilities to a level that would not continue to discourage white enrollment. The district court further found that capital improvements were "crucial to the overall success of [the] desegregation plan." *Id.*

1295. This Court affirmed the tax increase as modified by the appeals court, 110 S.Ct. 1651 (1990).

The court of appeals affirmed findings that the defendants were to blame for the deteriorated facilities of the school district, that the improvements were necessary to achieve the desegregation of the district, and that the capital plan was not excessive to the requirements of the desegregation plan nor beyond the scope of the violations. *Id.* 855 F.2d at 1304-5.

E. Missouri's Specific Complaints

Central High School was the first high school that the State's and KCMSD's post-1954 violations caused to turn from an all-white to all-black school in the space of a few years. *See supra* note 14 and accompanying text. By the time the court had adjudicated the violation and was devising a remedy, Central was an all-black high school located in the center of an all-black residential corridor created by the State's housing violations and the district's school violations. Pet. App. at A42. *See supra* pp. 6-9. By then, the school was virtually falling down around its students. As the court found, restoring the integrated student population that Central would have had in 1954 had the district and the State required the integrated populations living near the school to attend it posed a "challenge" thirty years later. In the magnet school order not here at issue, the court directed that Central be renovated or replaced. Order, November 12, 1986. That plan provided for a dual theme magnet high school featuring a computer-based educational plan and a "Classical Greek" theme featuring a combination of rigorous academic and athletic programs. The district court noted that the "extensive" facilities and budget provided for in the plan were "necessary" to achieve "the difficult task of desegregating Central High School." Pet. App. at A49.

As the school district developed its design documents for Central, it discovered errors and incorrect

assumptions in the estimates underlying the court's original budget and sought the district court's approval for a revised budget. In approving the adjustments, the district court found that the school district had used proper budgeting procedures, had eliminated nonessential features of the plan, and had reduced costs wherever possible. Pet. App. at A49. It found a second time that the desegregative magnet program for Central "could not be successfully implemented in a lesser facility." *Id.*

On appeal, the court of appeals held that the conditions the district court identified as requiring a budget adjustment were properly found as a matter of fact. The appellate court accordingly concluded that the district court had properly modified the prior injunction "in the exercise of equitable discretion," and affirmed the modified Central High School plan. Pet. App. at A32-34.

The State did not seek a stay of the district court's order, and the KCMSD thereupon completed construction of Central High School. Nearly 1200 students are now enrolled in Central, including a significant and growing number of nonminorities.[24]

2. *Asbestos.* The capital improvements that the district court found were necessary to cure the educational, financial, and demographic effects of the violation required the KCMSD to renovate certain structures and to demolish others. Federal law[25] in turn required the KCMSD, in carrying out those renovation and demolition

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[24] Central, in this its first year in the new school, has 31.2% nonminority enrollment in the Classical Greek theme and 13.2% in the computers theme. Before the remedy was ordered Central was 99.7% minority. Ex.K2.

[25] Asbestos Hazard and Emergency Response Act, 15 U.S.C. §§2641-2654 (1988).

orders, to meet certain standards concerning the abatement of asbestos in public buildings undergoing construction and repair. Finding that the State's and KCMSD's constitutional violations were the reason why renovations were required and, thus, were the reason why federally mandated asbestos abatement had to occur, and finding that eliminating health hazards was an important component of a cure for the district's educational deficits and necessary to the success of the desegregation plan, Pet. App. at A56, the district court found that the expense of meeting the asbestos abatement requirements of federal law was a part of the overall desegregation expense. The court accordingly ordered the State and the KCMSD to share equally in the cost of abating asbestos that was likely to be dislodged in the course of completing the capital improvement plan.[26]

The court of appeals affirmed. Pet. App. at A24-26. It found that, in the "unique circumstances presented here," asbestos abatement during building work was necessary to assure "safe and healthy school facilities that are not an obstacle to education or to desegregation." Pet. App. at A-25.

The asbestos abatement tasks in the capital improvement work ordered by the district court are now virtually complete.

REASONS FOR DENYING THE WRIT

Unashamedly candid in its petition, the State of Missouri all but admits that the questions it here presents are

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[26] Similarly, the school district's capital program ordered by the court includes the cost of compliance with minimum and prevailing wage laws, OSHA's construction safety standards, and air quality standards. The State does not challenge those components of the plan.

not themselves worthy of this Court's plenary attention. Scrutiny of Missouri's petition yields not a hint of a conflict in the circuits nor even a suggestion of an important federal question presented by the budget-adjustment and asbestos-abatement matters that are all that is actually before the Court. Instead, Missouri freights two narrow, technical orders with the full weight of a remedy devised over almost a decade and grounded firmly in the nature and scope of the unique set of violations that necessitated the remedy. In the process, the State asks the Court to review (i) the district court's violation findings, which the State *never appealed*; (ii) the district court's 1984, 1985, 1986, and 1987 findings detailing the various educational, financial, physical, and racially segregative effects of the State's violations, which the State *never appealed*; (iii) the district court's 1985, 1986, and 1987 remedy orders, which the State either *never appealed* or as to which this Court previously has *denied certiorari*; and (iv) two more recent technical orders requiring certain remedial adjustments and details, as which the State never sought a stay and which accordingly are now, or soon to be, *entirely completed*.

The uninteresting, and now almost entirely academic, questions (whether, in the course of capital improvements, it was proper to make the school district adhere to federal asbestos-abatement safety standards and whether it was proper to correct estimation errors in the budget for a construction project previously affirmed on appeal) do not themselves merit this Court's review and cannot bear the weight of the many long-since-resolved issues that Missouri attempts to load upon them. Nor is there any reason to bootstrap a wider review of previously unappealed orders onto those two mundane questions.

A. THE LEGAL STANDARDS ON WHICH THE DISTRICT COURT RELIED IN SHAPING THE REMEDY ARE UNOBJECTABLE, MANDATE THE REMEDY ORDERED, AND WERE NEVER APPEALED BY THE STATE.

In its first remedy order in 1985 the district court adopted as its guiding principles the very constitutional limitations on remedies that the State claims were ignored.[27] The court insisted that "the scope of the remedy [be] determined by the nature and extent of the violation" and that the remedy eliminate "the vestiges of state imposed segregation." 639 F.Supp. at 23 (citing *Milliken v. Bradley*, 418 U.S. 717, 744 (1974)). Missouri has never challenged the appropriateness of these principles.

The court then proceeded to make findings of fact that linked violations to effects and linked effects to each component of the remedy the court ordered. Specifically, the court first found intentional segregation of blacks in the KCMSD and intentional degradation of the district's education program. The district court next found that these violations caused an "intense[]" concentration of blacks within the KCMSD, "inferior" educational opportunities, and a "system wide reduction in student achievement," 639 F.Supp. at 24, which in turn, caused "large numbers" of whites to flee from the KCMSD to suburban districts. Order of August 25, 1986. Next, the court found that in the absence of feasible and legally warranted mandatory-busing plans, and given the State's refusal to arrange for a transfer of blacks to the suburbs,

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[27] 639 F.Supp. at 23 (relying on *Milliken, Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979), *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1976), *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971), *Keyes v. School District No. 1*, 413 U.S. 189 (1973), *Green v. County School Board*, 391 U.S. 430 (1968), and *Watson v. Memphis*, 373 U.S. 526 (1963)).

only a magnet school plan could be a valuable and effective means of desegregating the district by attracting back a voluntarily integrated enrollment. Order of November 12, 1986. Finally, the court found that improving the buildings of the school district was "crucial to the overall success of the desegregation plan" and to overcoming the educational and physical effects of the violation. 672 F.Supp. at 403. None of those fact findings has ever been challenged by the State as erroneous.

In reviewing the remedy orders, the court of appeals relied on the same principles, 855 F.2d at 1299, approved the district court's fact findings, tested the remedies adopted against the limiting principles in *Milliken* and other cases, and affirmed the remedies.

To this date, Missouri has *never* claimed that the legal standards the courts below applied are incorrect, nor that the district's "violation" findings are incorrect, nor that the district court's effects (or "vestiges") findings are incorrect, nor that there should be no educational improvements to cure some of these effects, nor that magnet schools and voluntary transfers are impermissible means of curing other effects, nor that capital improvements are anything other than "crucial" to the success of the overall plan to cure the violations, nor that Central High School should not be replaced, nor even that asbestos should not be abated when necessary restorations take place.[28] Because the parties are in agreement on the applicable legal standards, because those standards

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[28] Indeed, before the district court entered the order now at issue, the State proposed its own asbestos abatement program, including its own request that the State be ordered to fund that abatement. State's Ex. 9 (August, 1987). Furthermore, as the court of appeals found, Missouri "did not appeal earlier orders of the district court and this court that included asbestos abatement costs." Pet.App. at A26.

premise an appropriate remedy on the district court's findings of violations, effects and necessary measures to cure those effects, and because the district court made, the court of appeals affirmed, and in most cases the State never appealed the requisite findings, there is no question of interest that is presented by this case.

B. The State's Defaults Since The Remedial Process Began, and Not Any Error by the Lower Courts, Are Responsible for the Remedial Expense.

The district court's findings of unconstitutional school segregation placed Missouri immediately under an "affirmative duty to take whatever steps might be necessary" to cure the segregative, educational and other effects of that violation. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459, (1979) (quoting *Green v. County School Bd.*, 391 U.S. 430, 437-38 (1968)). Explicitly invoking the State's constitutional obligation, the district court concluded its findings of violations by calling upon the State, on its own, to remedy the effects of its violation. 593 F.Supp. at 1505. Most specifically, the Court noted that the Missouri General Assembly "established the school districts and if it deems necessary, can change them" to achieve desegregation. Although the State's chief state school officer reached the same conclusion even before the district court rendered its decision,[29] Missouri ignored the court's invitation.

In 1985 the school district and the Jenkins class proposed a comprehensive remedy that would have consolidated area districts and achieved desegregation instantly and at very little cost to the State. Missouri opposed a mandatory interdistrict remedy, and the district court rejected it. Order, January 25, 1985. In 1985 the district

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[29] *See supra* note 11 and accompanying text.

court invited plans for magnet schools, 639 F.Supp. at 34, but again Missouri chose to submit no lan whatsoever, leaving the district court with no alternative but to work from the plan jointly submitted by the plaintift schoolchildren and the KCMSD.

Also in 1985, the court asked the State to use its good offices to establish a transfer plan for minorities to attend school in volunteering suburban school districts. 639 F.Supp. at 38. Among the beneficial features of such a plan to overcome the State's "intensive" concentration of blacks in the KCMSD would be its minimal cost, inasmuch as integrated sets of students could be educated in existing and educationally attractive facilities in the suburbs, in lieu of requiring the KCMSD to tear down old schools (abating asbestos in the process) and build new ones (among them Central High). Again, the State did not act. In 1986 the district court admonished the State to act, threatening to find "other methods of accomplishing this task at the State's expense." *Id.* at 51. Still, the State failed to establish a transfer program even though its success would have greatly reduced the expenses of the voluntary KCMSD plan about which it continues to complain.

Similarly, when the district court in 1987 sought suggestions for helping the KCMSD fund its share of the desegregation costs, the State offered no plan, expressed no opposition to the schoolchildren's motion for a court-ordered tax increase, and insisted that means be found to enable the school district to pay its own share. Yet, when the district court adopted the only proposal before it, in which the State previously had acquiesced, the State suddenly objected and brought the matter to this Court – still without alternative suggestions.

In summary, over and over again for nearly 40 years now, the State has adhered to a single unconstitutional and unhelpful pattern of action in this case: defaulting in

its primary duty to cure the effects of its violation; defaulting in its fall-back duty to propose remedies for the court's consideration; withholding objection from, and even supporting, aspects of the remedy that the Court is considering; and then complaining after-the-fact about the expense of remedies that it never previously opposed and that were necessitated by the extent and continuation of its violations and by its rejection of less costly remedial options.

Now, Missouri again attacks a remedy for which it has proposed no alternative of its own, as to which it has resisted every alternative remedy proposed by others, and about which it has limited its contribution to after-the-fact complaints about expense. The violations found against Missouri, and never appealed, caused "a large number of whites" to flee the school district to the suburbs, degraded the educational opportunities for the minority students left behind, and literally "rotted" the district's instructional plan. Missouri accordingly placed itself under a continuing obligation to the schoolchildren, and to the courts, to eliminate those effects, an obligation satisfied only by effective actions to decrease the effects of its segregation. *Columbus*, 443 U.S. at 459. Yet, in this Court, as consistently below, Missouri fails to identify how the schoolchildren will be relieved of harms that no party denies the State caused and that no party doubts still exist.

Moreover, the State itself is responsible for the single aspect of the remedy about which it complains, namely, cost. According to the district court's findings, the State intentionally segregated blacks within the KCMSD for 120 years prior to September 1984, causing the system-wide racial segregation of the district, generating pervasive education decline, and resulting in massive physical decay. The cost of curing these illegally caused conditions

is undoubtedly expensive. But how could a cure for 120 years of determined and racially, educationally, and physically costly violations be *other* than expensive?

Accordingly, whether because of its ongoing constitutional default, its unclean hands, or its having repeatedly sandbagged the district court, the State has no valid complaint about a remedy that its unlawful pre- and post-*Brown* actions required or a remedial expense that its post-1984 inaction has singlehandedly inflated.

C. The Remedy is Manifestly Within the Court's Discretion Given its Avoidance of Remedial Burdens on Parties Other Than Those Directly Responsible for the Violation and its Effectiveness.

Initially, the Jenkins class of schoolchildren favored and sought an interdistrict remedy but the district court denied consolidation relief, concluding that the remedy would excessively intrude the court in the affairs of the suburban school districts. The court then noted that the Missouri General Assembly had created those districts and could easily and integratively reorganize them if it chose. "If such legislation is the only means by which the State can fulfill its fourteenth amendment obligations," the court wrote, "then such legislation is mandatory." 593 F.Supp. at 1504. The General Assembly chose not to act, however, and the court chose not to make it act – again given the extent to which such an order, although supportive of the least expensive and most effective remedial option, might intrude on the interests of innocent suburban jurisdictions and citizens.

The district court next asked the State to use its good offices to secure voluntary participation by the suburbs in a voluntary interdistrict desegregation remedy. 639 F.Supp. at 38. While more expensive than a remedy that simply redrew boundary lines, such a plan still would

have been less expensive than having to build magnet schools and refurbish facilities in the KCMSD. Nonetheless, despite repeated orders by the district court, the State refused to act. Absent action by the State, and barring pressure by the court on innocent suburban districts, parents, and children, the remedial constraint on involving innocent parties trumped the remedial requirement of effective removal of segregative vestiges, and no interdistrict transfer was implemented.

In early 1985, the State proposed a mandatory *intra*-district remedy to move the plaintiff schoolchildren from one inferior facility with substandard educational services and a majority black student body to another. *Id.* at 35. The district court rejected this approach as well – on grounds that the State's proposal not only burdened innocent victims of the violations but also would have been entirely ineffective in removing the segregative and educational effects of the State's violation.

Having rejected all these remedies as excessively intrusive on the interests of innocent individuals and suburban school districts and having rejected the State's single proposal on the additional ground of remedial ineffectiveness, the district court instead ordered a less intrusive remedy: academic programs and ancillary relief to remedy the segregation-caused inferior education available to students in the mostly minority KCMSD as approved in *Milliken v. Bradley II*, 433 U.S. 267 (1977); voluntary transfers of nonminorities to magnet schools as also approved in *id.*; and refurbished buildings in the KCMSD to reverse some of the physical, educational and segregative effects of the State's violations.

It is true that the remedy imposed was more expensive than the other proposals. It also is true, as plaintiffs have repeatedly made clear to the district court, that this remedy is (and remains) less satisfactory to them –

because it is less immediately effective – than either a mandatory interdistrict consolidation plan or a mandatory interdistrict transfer plan or even a meaningful *voluntary* interdistrict transfer plan. But the plan the court chose has another virtue, which is legally decisive under the this Court's remedial-effectiveness decision in *Green*, 391 U.S. at 437-39, and its remedial-limits decision in *Milliken*, 433 U.S. at 280, as interpreted by the district court: among all the available plans, the one the court imposed is the only one that holds out even a hope of removing the vestiges of the State's violations and, at the same time, does not mandatorily involve school districts and schoolchildren who were not responsible for those violations.

The district court can hardly be said to have abused its discretion in selecting the only educationally and desegregatively effective option that is available.

D. The Remedy Is Working

Having eschewed the broader, mandatory, and more intrusive plans first presented to it, and having declined Missouri's requests that the violations be left essentially without a remedy, the district court adopted a middle course and ordered a voluntary plan. As the court of appeals noted, although the "KCMSD has only begun its vast efforts to remedy the vestiges of the dual system of education in the school district," 942 F.2d at 491, the district court's plan already is bearing fruit. This year 913 new nonminority students from the suburbs have been attracted to the KCMSD's magnet schools – Central High School among them – joining 778 nonminority students who have re-enrolled from previous years. These 1,691 students have caused for the first time in two decades a

significant increase in the percentage of nonminority students in the KCMSD. September, 1991 Census of Students.

The educational programs and improved facilities targeted for the mostly minority students in the KCMSD also show early signs of working. Science and math scores in many schools have especially shown dramatic improvement, reversing trends suffered in most urban schools.[30]

E. The Asbestos Abatement And Budget Adjustments to Which the State Objects Are Necessary, Proper, and Entirely Non-Controversial Components of the Remedial Effort

If, as Missouri never disputes, magnet schools are appropriate remedies for its violations, and if, as Missouri never disputes, buildings must be renovated to house those schools, and if as federal law requires and both courts found below, asbestos necessarily must be abated from buildings being renovated, then what possible objection can there be to include abatement in the remedial budget? Unable to challenge the fact findings that some construction is required as a part of the magnet remedy, that abatement is then required, and that the costs of abatement are thus necessarily costs of the magnet remedy, the State is reduced to attacking the overall price tag on a set of remedies that are not before the Court, in which the State has largely acquiesced, and as to which the State has no legally or equitably sound objection.

Similarly as to the Central High costs estimates, if construction of a new school is required by the magnet school remedy, the district court may estimate construction costs and change them upon appropriate fact findings to correct errors. No more than that was done by the lower courts, and

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[30] "Since 1987, KCMSD scores have improved on every subtest at every grade level" except two. Missouri Mastery and Achievement Tests, Spring, 1991 Performance at 2.

none of it is here challenged by Missouri for being based on erroneous findings. Thus, as to Central also, the State finds it must attack the remedy itself.

The original 1985 remedy order, 639 F.Supp. 19, provided for both magnet schools and capital improvements. The State did not appeal the magnet school order and the provision for capital improvements was affirmed, 807 F.2d at 685, and Missouri did not seek certiorari. Missouri thus seeks relief from principles established in orders entered nearly seven years ago, principles it does not challenge, and from fact findings implementing those principles, fact findings it does not challenge as erroneous. There is thus no basis for accepting Missouri's invitation to use two narrow orders as the means for a broad and wholesale review of a remedy properly adopted years ago and appropriately implemented ever since.

CONCLUSION

For the foregoing reasons, the writs should be denied.

Respectfully submitted,

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